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No. 99-1178

In the Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,
PETITIONER

v.

UNITED STATES ARMY CORPS OF ENGINEERS, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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QUESTIONS PRESENTED

Section 404 of the Federal Water Pollution Control Act Amendments of 1972, as amended (Clean Water Act), 33 U.S.C. 1344, authorizes the United States Army Corps of Engineers to issue permits for the discharge of dredged or fill material into "navigable waters," defined by the Act as "waters of the United States," see 33 U.S.C. 1362(7). In the instant case, the Corps determined that a series of permanent and seasonal ponds and small lakes on petitioner's property are "waters of the United States" because they are used as habitat by numerous species of migratory birds. The questions presented are as follows:

1. Whether the Corps' determination that the waters at issue are subject to its regulatory jurisdiction is based on a permissible construction of the Clean Water Act.

2. Whether use of the waters as migratory bird habitat is a constitutionally sufficient basis for the exercise of federal regulatory jurisdiction.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 191 F.3d 845. The opinion of the district court (Pet. App. 14a-36a) is reported at 998 F. Supp. 946.

JURISDICTION

The judgment of the court of appeals was entered on October 7, 1999. On December 16, 1999, Justice Stevens extended the time for filing a petition for a writ of certiorari to January 14, 2000, and the petition was filed on that date. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

1. Congress enacted the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, Pub. L. No. 95-217, 91 Stat. 1566, 33 U.S.C. 1251 *et seq.* (Clean Water Act or CWA) "to restore and maintain the chemical, physical and biological integrity of the Nation's waters." 33 U.S.C. 1251(a). One of the goals of the CWA is

to attain "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. 1251(a)(2). A major tool in achieving that purpose is a prohibition on the discharge of any pollutants, including dredged or fill material, into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). The CWA provides that "[t]he term 'navigable waters' means the waters of the United States, including the territorial seas." 33 U.S.C. 1362(7). The Conference Report accompanying the CWA explained that "[t]he conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972).

Discharges of dredged or fill material into "waters of the United States" may be authorized by a permit issued by the Army Corps of Engineers (Corps) pursuant to Section 404 of the CWA, 33 U.S.C. 1344. Regulations implementing the Corps' Section 404 permitting authority were first published in 1974. 39 Fed. Reg. 12,115. Those regulations defined the term "navigable waters" to mean "those waters of the United States which are subject to the ebb and flow of the tide, and/or are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce." 33 C.F.R. 209.120(d)(1) (1974). See also 33 C.F.R. 209.260(e)(1) (1974) (explaining that "[i]t is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor").

The Corps' initial view of the scope of its Section 404 jurisdiction met with substantial opposition. Several federal courts considering the coverage of wetlands adjacent to other waters held that the Corps had given Section 404 an unduly restrictive reading. See, *e.g.*, *United States* v. *Holland*, 373 F. Supp. 665, 670-676 (M.D. Fla. 1974). The

court in *Holland* examined the text and history of the CWA, *id.* at 671-672, as well as this Court's precedents construing the Commerce Clause, and concluded that "Congress had the power to go beyond the 'navigability' limitation in its control over water pollution and that it intended to do so." *Id.* at 673. The Environmental Protection Agency (EPA) and the House Committee on Government Operations expressed agreement with the decision in *Holland*.[1] In *Natural Resources Defense Council, Inc.* v. *Callaway*, 392 F. Supp. 685, 686 (D.D.C. 1975), the court held that in the CWA Congress had "asserted federal jurisdiction over the nation's waters to the maximum extent permissible under the Commerce Clause of the Constitution. Accordingly, as used

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[1] EPA expressed the view that "the *Holland* decision provides a necessary step for the preservation of our limited wetland resources," and that "the [*Holland*] court properly interpreted the jurisdiction granted under the [CWA] and Congressional power to make such a grant." See *Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before the Senate Comm. on Pub. Works*, 94th Cong., 2d Sess. 349 (1976) (letter dated June 19, 1974, from Russell E. Train, Administrator of EPA, to Lt. Gen. W.C. Gribble, Jr., Chief of Corps of Engineers). EPA explained that it "firmly believe[d] that the Conference Committee deleted 'navigable' from the [CWA] definition of 'navigable waters' in order to free pollution control from jurisdictional restrictions based on 'navigability.'" *Id.* at 350. Shortly thereafter, the House Committee on Government Operations discussed the disagreement between the two agencies (as reflected in EPA's June 19 letter) and concluded that the Corps should adopt the broader view of the term "waters of the United States" taken by EPA and by the court in *Holland*. See H.R. Rep. No. 1396, 93d Cong., 2d Sess. 23-27 (1974). The Committee urged the Corps to adopt a new definition that "complies with the congressional mandate that this term be given the broadest possible constitutional interpretation." *Id.* at 27 (internal quotation marks omitted).

EPA administers the CWA except as otherwise explicitly provided. 33 U.S.C. 1251(d). The Attorney General has determined that the "ultimate administrative authority to determine the reach of the term 'navigable waters' for purposes of § 404" resides with EPA. 43 Op. Att'y Gen. 197 (1979).

in the Water Act, the term ['navigable waters'] is not limited to the traditional tests of navigability." The court ordered the Corps to publish new regulations "clearly recognizing the full regulatory mandate of the Water Act." *Ibid.*

In response to the district court's order in *Callaway*, the Corps promulgated interim final regulations providing for a phased-in expansion of its Section 404 jurisdiction. 40 Fed. Reg. 31,320 (1975); see 33 C.F.R. 209.120(d)(2) and (e)(2) (1976). The interim regulations revised the definition of "waters of the United States" to include, *inter alia*, waters (sometimes referred to as "isolated waters") that are not connected by surface water or adjacent to traditional navigable waters. 33 C.F.R. 209.120(d)(2)(i) (1976).[2] On July 19, 1977, the Corps published its final regulations, in which it revised the 1975 interim regulations to clarify many of the definitional terms. 42 Fed. Reg. 37,122. The 1977 final regulations defined the term "waters of the United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 33 C.F.R. 323.2(a)(5) (1978).[3] The Corps' current regulation

[2] Phase I, which was immediately effective, included coastal waters and traditional inland navigable waters and their adjacent wetlands. 40 Fed. Reg. 31,321, 31,324, 31,326 (1975). Phase II, which took effect on July 1, 1976, extended the Corps' jurisdiction to lakes and primary tributaries of Phase I waters, as well as wetlands adjacent to the lakes and primary tributaries. *Ibid.* Phase III, which took effect on July 1, 1977, extended the Corps' jurisdiction to all remaining areas encompassed by the regulations, including "intermittent rivers, streams, tributaries, and perched wetlands that are not contiguous or adjacent to navigable waters." *Id.* at 31,325; see also 42 Fed. Reg. 37,124 (1977) (describing the three phases).

[3] An explanatory footnote published in the Code of Federal Regulations stated that "[p]aragraph (a)(5) incorporates all other waters of the United States that could be regulated under the Federal government's Constitutional powers to regulate and protect interstate commerce." 33 C.F.R. 323.2(a)(5), at 616 n.2 (1978).

contains similar language, see 33 C.F.R. 328.3(a)(3),[4] and EPA has promulgated regulations that include a substantially identical definition of the term "waters of the United States." See 40 C.F.R. 230.3(s)(3); 40 C.F.R. 232.2; 40 C.F.R. 122.2.

In 1977, Congress considered a legislative proposal that would have limited the class of waters subject to the Corps' permitting authority under Section 404 of the CWA. A bill passed by the House of Representatives provided that for purposes of Section 404, the Corps' permitting authority would extend to navigable waters "and adjacent wetlands," with the term "navigable waters" defined to mean waters navigable in fact, or capable of being made so by "reasonable improvement." 123 Cong. Rec. 10,420 (1977); see *id.* at 10,434 (passage of bill). A similar amendment was defeated in the Senate, however, see *id.* at 26,728, and the provision to redefine the term "navigable waters" was eliminated by the Conference Committee, see H.R. Conf. Rep. No. 830, 95th Cong., 1st Sess. 97-105 (1977).[5]

[4] The current regulation defines "waters of the United States" to include, *inter alia*, "[a]ll other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3).

[5] Although Congress declined to diminish the geographic scope of the Corps' regulatory jurisdiction, it amended Section 404 in significant respects. *Inter alia*, the 1977 Act, Pub. L. No. 95-217, 91 Stat. 1566, established a mechanism by which a State may assume responsibility for administration of the Section 404 program with respect to waters "other than" traditional navigable waters and their adjacent wetlands. 33 U.S.C. 1344(g)(1). The 1977 legislation also exempted specified activities—most notably certain agricultural and silvicultural activities—from Section 404's permit requirements. See 33 U.S.C. 1344(f).

In 1986, the Corps consolidated and recodified its regulatory provisions defining "waters of the United States" for purposes of the Section 404 program. See 51 Fed. Reg. 41,216-41,217 (1986). The Corps explained that the new regulations neither reduced nor expanded its jurisdiction. *Id.* at 41,217. Rather, their "purpose was to clarify the scope of the 404 program by defining the terms in accordance with the way the program is presently being conducted." *Ibid.* In the preamble to the regulations, the Corps observed that EPA had "clarified that waters of the United States" include waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," as well as waters "[w]hich are or would be used as habitat by other migratory birds which cross state lines." *Ibid.*

2. a. Petitioner is a consortium of Illinois municipalities formed for the purpose of locating and developing a disposal site for nonhazardous waste. Pet. App. 1a-2a. Petitioner owns a 533-acre parcel of land in Cook and Kane Counties, Illinois, on which it proposed to locate a solid waste landfill. *Ibid.* The project site is 410 acres in size, 298 acres of which is an "early successional stage forest." *Id.* at 2a. Although the site was used 50 years ago for surface mining, it has evolved to include "over 200 permanent and seasonal ponds * * * rang[ing] from less than one-tenth of an acre to several acres in size, and from several inches to several feet in depth." *Ibid.* The site functions as a single aquatic ecosystem, *i.e.*, "a large wooded wetland complex." Pet. C.A. App. 72 (Administrative Record (A.R.) 16,793); see also Fed. C.A. App. 31 (A.R. 15,691) ("[T]he aquatic areas are part of a large, contiguous forested ecosystem."); Fed. C.A. App. 296 (A.R. 44,708). The site is also located directly above an aquifer that supplies drinking water to the region. Fed. C.A. App. 89, 94-102 (A.R. 15,748, 15,753-15,761); Pet. C.A. App. 93 (A.R. 15,581).

The ponds on petitioner's land are inhabited by a wide variety of aquatic wildlife, including such fish as largemouth

bass, carp, bluegill, and black crappie; five species of toads and frogs; two turtle species; and several salamander species. A.R. 40,302, 40,364. In addition, 121 different species of birds have been observed on the project site, including species that "depend on aquatic environments for a significant portion of their life requirements" and "migrate through portions of the United States." Pet. C.A. App. 90 (A.R. 15,578); see also Fed. C.A. App. 6-10 (A.R. 2464-2468) ("Master List of Bird Species Known to Use the Balefill Site"). "Among the species that have been seen nesting, feeding, or breeding at the site are mallard ducks, wood ducks, Canada geese, sandpipers, kingfishers, water thrushes, swamp [sparrows], redwinged blackbirds, tree swallows, and several varieties of herons." Pet. App. 3a. Each of the above-listed species is on the list of migratory bird species protected under international treaties. See 50 C.F.R. 10.13. "[T]he site is a seasonal home to the second-largest breeding colony of great blue herons in northeastern Illinois, with approximately 192 nests in 1993." Pet. App. 3a. In addition, the ponds provide breeding habitat for several bird species that have been listed as threatened or endangered by the Illinois Endangered Species Protection Board, including the Veery and the Cooper's Hawk, which require isolated aquatic habitats for breeding. Pet. C.A. App. 99-100 (A.R. 15,587-15,588); Fed. C.A. App. 191, 288 (A.R. 16,383, 40,418). More than 50 species of birds are known to breed on the site. *Ibid.*; see also Fed. C.A. App. 285 (A.R. 40,415).[6]

b. Petitioner's proposed landfill would involve the filling of approximately 17.6 acres of the ponds and small lakes on its property. Pet. App. 3a, 15a. The Corps initially concluded that the site did not contain any "waters of the United States" subject to its regulatory jurisdiction. See Pet. C.A. App. 60-61. After receiving evidence from the

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[6] The site also provides habitat for 30 mammal species and 200 plant species. Pet. C.A. App. 92-93 (A.R. 15,580-15,581).

Illinois Nature Preserves Commission, however, the Corps found that the water bodies on petitioner's property are "waters of the United States" because, *inter alia*, "the water areas are used as habitat by migratory bird[s] which cross state lines." *Id.* at 90 (A.R. 15,578); see also Pet. App. 3a-4a, 15a-16a. Petitioner subsequently applied to the Corps for a Section 404 permit to fill those waters.[7] See Pet. C.A. App. 85-86 (A.R. 15,573-15,574); Pet. App. 3a-4a, 16a.

In July 1994, after an extensive public review process and input from numerous local, state, and federal agencies, the Corps denied petitioner's permit application. Pet. C.A. App. 84-171 (A.R. 16,672, 15,573-15,659); Pet. App. 4a, 16a. The Corps based the permit denial on its findings that (1) the filling of the ponds and other waters on the site would eliminate habitat for numerous species of birds and other wildlife, Pet. C.A. App. 155-157 (A.R. 15,643-15,645); Fed. C.A. App. 32-40 (A.R. 15,692-15,700); (2) petitioner had failed to examine available alternatives to the proposed landfill that would be less environmentally damaging, Pet. C.A. App. 170 (A.R. 15,658); and (3) the project poses "an unacceptable risk to the public's drinking water supply" due to the possibility that leachate from the landfill could contaminate groundwater aquifers, Pet. C.A. App. 171 (A.R. 15,659).

The Corps found that the site is especially important as wildlife habitat due to the loss of similar wooded aquatic habitats in the region. Pet. C.A. App. 155 (A.R. 15,643); Fed. C.A. App. 33 (A.R. 15,693). It noted the views of some

[7] As noted above (see note 5, supra), the CWA in its current form provides a mechanism by which a State may assume responsibility for administration of the Section 404 program with respect to waters "other than" traditional navigable waters and their adjacent wetlands. 33 U.S.C. 1344(g)(1). Two States—Michigan and New Jersey—have submitted and obtained approval of their own programs for partial administration of the Section 404 program. See 40 C.F.R. 233.70, 233.71. Because Illinois has not assumed that function, administration of Section 404 with respect to the waters at issue in this case remains the responsibility of the Corps.

experts that "[m]uch of the current severe drop in area-sensitive bird populations is blamed on habitat destruction." *Ibid.* The Corps' assessment was based in part on the recommendation of the United States Fish and Wildlife Service (FWS), which conducted an extensive analysis, see Fed. C.A. App. 190-198 (A.R. 16,382-16,390), and concluded that "[b]ecause of its value to migratory birds, we do not believe this site is an appropriate place to site a landfill." *Id.* at 197 (A.R. 16,389); see Pet. C.A. App. 93 (A.R. 15,581) (Corps' decision document notes the FWS's recommendation).[8]

3. Petitioner sought review of the Corps' decision in federal district court under the Administrative Procedure Act, 5 U.S.C. 701 *et seq.* Pet. App. 14a. Petitioner challenged both the Corps' assertion of regulatory jurisdiction and the merits of the permit denial. *Id.* at 1a. The district court granted summary judgment for the government on the issue of CWA jurisdiction. *Id.* at 14a-36a. Petitioner then consented to dismissal with prejudice of its remaining claims, and the district court entered final judgment in favor of the government. *Id.* at 2a.

4. The court of appeals affirmed. Pet. App. 1a-13a. The court observed that petitioner had "abandoned its challenge to the merits of the Corps' decisions and ha[d] instead focused exclusively on its challenge to" the Corps' assertion

[8] FWS explained that "the project has a high probability of adversely affecting breeding habitat of area-sensitive migratory birds, and will likely result in the abandonment of the site by breeding great blue herons." Fed. C.A. App. 190 (A.R. 16,382). It observed that "[h]abitat area requirements for forest birds in the midwest are scarce or lacking," *id.* at 192 (A.R. 16,384), and that preservation of existing sites is accordingly important. The FWS acknowledged "the enormity of the solid waste disposal problem and * * * [the Corps'] mandate to balance competing interests" but stated that "the continued incremental loss of significant habitat for species of concern and its implication for the long-term preservation of biological diversity is a societal problem on par with solid waste disposal." *Id.* at 197 (A.R. 16,389).

of regulatory jurisdiction. *Id.* at 4a. The court therefore "accept[ed] as true the Corps' factual findings with regard to [petitioner's] permit application, including the crucial finding that the waters of this site were a habitat for migratory birds." *Id.* at 5a.

a. The court of appeals rejected petitioner's contention that "Congress lacked the power to grant the Corps regulatory jurisdiction over isolated, intrastate waters based on the presence of migratory birds alone." Pet. App. 5a. Prior to this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995), the court explained, "it had been established that Congress' powers under the Commerce Clause were broad enough to permit regulation of waters based on the presence of migratory birds." Pet. App. 5a (citing cases). The court found that *Lopez* had not undermined that rule. It observed that "*Lopez* expressly recognized, and in no way disapproved, the cumulative impact doctrine, under which a single activity that itself has no discernible effect on interstate commerce may still be regulated if the aggregate effect of that class of activity has a substantial impact on interstate commerce." *Id.* at 6a.

The court summarized statistical evidence showing that Americans engage in frequent interstate travel and spend substantial sums of money in order to hunt and observe migratory birds. Pet. App. 7a. It concluded that

> the destruction of migratory bird habitat and the attendant decrease in the populations of these birds "substantially affects" interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires.

Ibid. The court also stated that "the numerous international treaties and conventions designed to protect migratory birds, * * * as well as the case law recognizing the 'national

interest of very nearly the first magnitude' in protecting such birds," refuted petitioner's contention that the protection of migratory bird habitat is a matter of purely local concern. *Id.* at 8a (quoting *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983)).

b. The court of appeals rejected petitioner's argument that the Corps' exercise of regulatory jurisdiction exceeded its authority under the CWA. The court observed that the construction of the statutory term "waters of the United States" utilized by the Corps and EPA is entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Pet App. 9a. The court found it "well established that the geographical scope of the Act reaches as many waters as the Commerce Clause allows." *Ibid.* (citing cases). It concluded that, "[b]ecause Congress' power under the Commerce Clause is broad enough to permit regulation of waters based on the presence of migratory birds, it is certainly reasonable for the EPA and the Corps to interpret the Act in such a manner." *Id.* at 10a. The court of appeals also observed that in the present case, "the unchallenged facts show that the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat. Thus, we need not, and do not, reach the question of the Corps' jurisdiction over areas that are only potential habitats." *Ibid.*

SUMMARY OF ARGUMENT

A. The Corps and EPA have reasonably asserted CWA regulatory jurisdiction over all surface water bodies the degradation of which can be expected to affect interstate commerce.

1. By using the term "waters of the United States," Congress signaled its intent that the CWA's coverage is not limited by traditional conceptions of navigability. That conclusion is reinforced by other textual provisions, which declare the Act's purposes to include protection of fish and

wildlife and require the Corps to consider a broad range of interests in evaluating permit applications. And, significantly, Congress amended the CWA in 1977 to authorize States to administer the Section 404 program for waters "other than" traditional navigable waters and their adjacent wetlands. That provision would be meaningless if the Corps' jurisdiction were limited to traditional navigable waters.

2. The legislative history of the 1972 Act suggests that the CWA's coverage does not depend upon the suitability of particular waters for commercial traffic. By 1977, moreover, the Corps had asserted regulatory jurisdiction over "isolated" waters whose destruction could affect interstate commerce. During the debates on the 1977 amendments, the propriety of the Corps' assertion of jurisdiction over "isolated" waters was a principal subject of congressional concern. Legislative proposals that would have restricted the Corps' jurisdiction to traditional navigable waters and their adjacent wetlands were passed by the House and introduced in the Senate, but Congress ultimately declined to enact any such measure. Congress chose instead to counterbalance Section 404's extensive geographic reach by authorizing partial administration of the Section 404 program by the States, and by exempting specified activities from Section 404's permit requirements. Congress's refusal to overrule the Corps' construction of the CWA, together with its enactment of a new statutory provision that presumed the correctness of the existing regulatory definition, shows the reasonableness of the Corps' approach.

3. The Corps' interpretation of the phrase "waters of the United States" is entitled to deference, since the phrase is neither an established term of art nor one with an obvious "plain meaning." The Corps and EPA reasonably chose to employ a jurisdictional standard that turns on the prospect of interstate effects resulting from water pollution, rather than on a particular causal mechanism (surface water connections to traditional navigable waters) by which those

effects are produced. That approach is consistent with the text and history of the statute, with established administrative law precedents, and with principles of federalism.

B. The Corps' assertion of regulatory jurisdiction over "isolated" waters used as habitat by migratory birds is constitutional.

1. This Court has emphasized that limits on Commerce Clause authority serve ultimately to ensure that Congress does not assume a general police power or usurp functions more appropriately exercised by the States. The Court has long recognized, however, that the protection of migratory birds is primarily entrusted to the federal government because it is a task inherently unsuited to piecemeal accomplishment. The protection of suitable habitat is an integral feature of federal efforts to conserve migratory birds. Reaffirmation of federal power to protect migratory bird habitat is fully in keeping with traditional conceptions of the distinction between national and local spheres of authority.

2. The proposed activity for which petitioner sought a permit is commercial in character, and it would have a substantial impact on the bird species that use the area for habitat. The Court's inquiry should focus on the facts of this case, rather than on hypothetical applications of the Corps' jurisdictional rule to non-economic conduct. That approach is especially appropriate because the loss of migratory bird habitat has been caused overwhelmingly by commercial activities. Moreover, the Corps' rule is in terms self-limiting to applications within the commerce power.

3. The destruction of migratory bird habitat can be expected to have a substantial aggregate effect on interstate commerce. Bird hunting and bird watching activities each generate billions of dollars of commerce each year. Protection of national economic resources from the ill effects of local commercial activity is well within Congress's authority under the Commerce Clause.

ARGUMENT

This Court has recognized that "the power conferred by the Commerce Clause [is] broad enough to permit congressional regulation of activities causing air or water pollution, or other environmental hazards that may have effects in more than one State." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 282 (1981). The CWA reflects Congress's recognition that the degradation of water resources in one State may have significant interstate effects. See, *e.g.*, *City of Milwaukee* v. *Illinois*, 451 U.S. 304, 325-326 (1981) (explaining that the CWA provides a variety of mechanisms by which a State whose waters may be affected by a pollutant discharge in another State can participate in the permitting process). In defining the statutory term "waters of the United States," the Corps and EPA have identified categories of waters the degradation of which can be expected to cause significant harms in States other than that in which the pollution occurs.

The potential for interstate harm, and the consequent need for federal regulation, is particularly clear with respect to water bodies that span more than one State. It could not plausibly be contended, for example, that Illinois authorities should have the final say regarding the circumstances under which pollutants may be placed into the Mississippi River in Illinois. Indeed, long before the enactment of the CWA, the Water Pollution Control Act, ch. 758, § 2(d)(1), provided a federal mechanism for abatement of "[t]he pollution of interstate waters in or adjacent to any State or States * * * which endangers the health or welfare of persons in a State other than that in which the discharge originates." 62 Stat. 1156; see also *Illinois* v. *City of Milwaukee*, 406 U.S. 91, 102-108 (1972) (holding, prior to enactment of the CWA, that Illinois could assert a federal common-law cause of action to abate the pollution of Lake Michigan by a

municipality in another State).[9] Consistent with that longstanding federal policy, the Corps defines the term "waters of the United States" to include "[a]ll interstate waters including interstate wetlands." 33 C.F.R. 328.3(a)(2).

As petitioner recognizes (Br. 15-16), Congress also has well-established authority to regulate and protect water bodies that are located entirely within a single State but that provide actual or potential channels for interstate commercial traffic. The authority to protect such waterways is simply one aspect of Congress's power to "regulate the use of the channels of interstate commerce." *United States* v. *Lopez*, 514 U.S. 549, 558 (1995). The Corps' regulation defines the term "waters of the United States" to include "[a]ll waters which are currently used, or were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide." 33 C.F.R. 328.3(a)(1).

The Corps' regulation further recognizes that water pollution can affect national interests even where the waters in question are located entirely within a single State and are unsuitable for use as avenues for commerce. Thus, the Corps defines the term "waters of the United States" to include (in addition to the categories described above) "[a]ll other waters * * * the use, degradation or destruction of which could affect interstate or foreign commerce." 33 C.F.R. 328.3(a)(3). The Corps has not purported to offer a comprehensive list of the circumstances under which degradation of so-called "isolated" waters can be expected to

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[9] The Court has since held that the CWA preempts a federal common-law cause of action for interstate harms caused by water pollution, on the ground that Congress "has occupied the field through the establishment of a comprehensive regulatory program supervised by an expert administrative agency." *City of Milwaukee* v. *Illinois*, 451 U.S. at 317.

have the requisite effect on interstate or foreign commerce.[10] It has, however, expressed the view that intrastate waters "[w]hich are or would be used as habitat by birds protected by Migratory Bird Treaties," or "[w]hich are or would be used as habitat by other migratory birds which cross state lines," fall within the coverage of Section 328.3(a)(3). See 51 Fed. Reg. 41,217 (1986).

Taken as a whole, the Corps' regulation reflects an effort to identify categories of waters the degradation of which can be expected to have significant interstate effects, making protection of the relevant waters an appropriate subject of federal concern. The effect of identifying particular waters as "waters of the United States," it should be emphasized, is not to impose an absolute prohibition on the discharge of pollutants (including dredged and fill material). It is instead to ensure that such discharges will not be made without a federal permit. The Corps reasonably adopted a broad definition of the term "waters of the United States" in order to ensure that waters having potential interstate significance are not destroyed or degraded without a prior assessment of

[10] The term "isolated waters" is potentially misleading. The term is commonly used to refer to waters that are remote from and lack any surface connection to navigable waters as traditionally defined. See 33 C.F.R. 330.2(e). Even so-called "isolated waters," however, may have other hydrologic connections to, and affect the quality of, traditional navigable waters. "Isolated" waters may, for example, have groundwater connections to other waters. Many "isolated" waters also play an important role in flood control and erosion control, reducing the size and duration of floods by providing storage basins in flood prone areas. See generally Virginia Carter, *Wetland Hydrology, Water Quality, and Associated Functions*, *in* United States Geological Survey, *National Water Summary on Wetland Resources* 44 (1996); Thomas Dahl & Craig Johnson, U.S. Dep't of the Interior, *Status and Trends of Wetlands in the Conterminous United States, Mid-1970's to Mid-1980's* at 3 (1991); Fish and Wildlife Serv., U.S. Dep't of the Interior, *North American Waterfowl Management Plan* 11 (1986) (*Waterfowl Plan*).

their ecological importance and the likely impacts of the proposed activity.

Petitioner asserts two distinct challenges to the Corps' application of Section 328.3(a) to the development proposal at issue. First, petitioner contends that as a matter of statutory interpretation, the Corps' regulatory authority under the CWA is limited to waters that are either (1) usable for navigation in their current state or through reasonable improvement, or (2) connected through surface waters to waters that are navigable under the traditional conception of that term. Second, petitioner argues that as a matter of constitutional law, the use of waters as habitat by migratory birds provides a constitutionally insufficient basis for federal protection of those waters pursuant to the Commerce Clause. For the reasons that follow, those arguments lack merit.

I. THE CORPS HAS REASONABLY CONSTRUED THE TERM "WATERS OF THE UNITED STATES" TO INCLUDE WATERS WHOSE DEGRADATION OR DESTRUCTION COULD AFFECT INTERSTATE COMMERCE, EVEN WHERE THOSE WATERS ARE NOT NAVIGABLE IN FACT AND HAVE NO SURFACE CONNECTION TO WATERS THAT ARE NAVIGABLE IN FACT

The CWA was enacted in 1972 and substantially amended in 1977. As we explain below, the text and history of the 1972 Act reflected a congressional intent to expand the Act's coverage beyond the scope of prior water pollution laws—an expansion that suggested, but perhaps did not compel, the conclusion that the term "waters of the United States" encompasses isolated waters whose degradation or destruction could affect interstate commerce. See pp. 2-3 and note 1, *supra* (describing early discrepancy in approach between the

Corps and EPA). By 1977, however, the Corps had promulgated regulations that comprehensively construed the CWA to cover isolated waters, and Congress in 1977 engaged in prolonged debate regarding the propriety of that construction. In the end, Congress acquiesced in the Corps' (and EPA's) construction of the disputed statutory language, both by rejecting legislative proposals that would have narrowed the Corps' jurisdiction, and by amending the Act in a manner that presupposed the correctness of the Corps' approach.

A. The Text Of The CWA Makes Clear That The Act's Coverage Is Not Limited By Traditional Conceptions Of Navigability

1. The CWA proscribes the discharge of any "pollutant" into "navigable waters" except in accordance with the Act. See 33 U.S.C. 1311(a), 1362(12)(A). Standing alone, Congress's use of the phrase "navigable waters"—an existing term of art with an established legal meaning—might have suggested an intent to confine the Act's coverage to waters suitable for commercial traffic either in their natural state or with reasonable improvements. See, *e.g.*, *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 406-408, 416-417 (1940). Other provisions of the original CWA, however, indicated that the coverage of the Act was not so limited.

Most obviously, the term "navigable waters" was defined to include "the waters of the United States," 33 U.S.C. 1362(7)—a term of evident breadth, and one with no previously established legal meaning.[11] As the Court observed in *United States* v. *Riverside Bayview Homes*, 474 U.S. 121,

[11] Although petitioner suggests (see Br. 16, 18) that the term "waters of the United States" has an established legal meaning, the cases on which it relies all employed the term "*navigable* waters of the United States." Petitioner identifies no authority suggesting that the term "waters of the United States," standing alone, has traditionally implied any requirement of suitability for use by commercial traffic.

133 (1985), "the Act's definition of 'navigable waters' as 'the waters of the United States' makes it clear that the term 'navigable' as used in the Act is of limited import." Cf. *Babbitt* v. *Sweet Home Chapter of Communities for a Great Or.*, 515 U.S. 687, 705 (1995) ("An obviously broad word that the Senate went out of its way to add to an important statutory definition is precisely the sort of provision that deserves a respectful reading.").[12]

Other features of the CWA in its original form reinforced the conclusion that the Act was not limited to water bodies meeting traditional tests of navigability. *Inter alia*, the Act expresses Congress's objective of attaining "water quality which provides for the protection and propagation of fish, shellfish, and wildlife." 33 U.S.C. 1251(a)(2). The Act also directs the Corps in evaluating permit applications to consider guidelines developed by EPA in conjunction with the Corps, see 33 U.S.C. 1344(b); and EPA in formulating those

[12] In *Sweet Home*, the Court considered Section 9(a)(1)(B) of the Endangered Species Act (ESA) of 1973, 16 U.S.C. 1531 *et seq.*, which makes it unlawful to "take" any endangered or threatened species. 515 U.S. at 691 (quoting 16 U.S.C. 1538(a)(1)(B)). The ESA defines "take" to mean "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." *Ibid.* (quoting 16 U.S.C. 1532(19)). The Court rejected the contention that construction of the word "take" should be guided by the term's common-law meaning. *Id.* at 697 n.10. It explained that "Congress explicitly defined the operative term 'take' in the ESA, * * * thereby obviating the need for us to probe its meaning as we must probe the meaning of the undefined subsidiary term 'harm.'" *Ibid.* The Court sustained as reasonable an Interior Department regulation that defined "harm" to include "significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering." *Id.* at 691; see *id.* at 696-708. Similarly here, the judicial inquiry appropriately focuses on whether the contested Corps regulation reflects a permissible construction of the phrase "waters of the United States"—not whether the regulation accords with prior understandings of a term ("navigable waters") that Congress has expressly defined for purposes of the CWA.

guidelines must take into account the effect of discharges on "fish, shellfish, [and] wildlife," 33 U.S.C. 1343(c)(1)(A), "changes in marine ecosystem diversity, productivity, and stability," 33 U.S.C. 1343(c)(1)(B), and "esthetic, recreation, and economic values," 33 U.S.C. 1343(c)(1)(C). See *Riverside Bayview*, 474 U.S. at 132 (characterizing the CWA's purpose as the "[p]rotection of aquatic ecosystems"). In addition, EPA may veto or restrict the use of any site for the disposal of dredged or fill material when it determines that a discharge "will have an unacceptable adverse effect on municipal water supplies, shellfish beds and fishery areas (including spawning and breeding areas), wildlife, or recreational areas." 33 U.S.C. 1344(c). Because the potential for pollutant discharges to impair those values does not depend on the suitability of a water body for commercial traffic, the range of congressional objectives set forth in the text of the original Act strongly suggested that the CWA's coverage is not confined by traditional concepts of navigability.[13]

2. The clearest textual indication of the Act's expansive scope, however, was added to the CWA in 1977. Section 404(g)(1) of the Act (91 Stat. 1601) as amended provides in pertinent part:

> (1) The Governor of any State desiring to administer its own individual and general permit program for the discharge of dredged or fill material into *the navigable waters (other than those waters which are presently*

[13] "*In the absence of contrary indication*, [the Court] assume[s] that when a statute uses [an existing term of art], Congress intended it to have its established meaning." *McDermott Int'l, Inc.* v. *Wilander*, 498 U.S. 337, 342 (1991) (emphasis added); see Pet. Br. 16. As the italicized language makes clear, that principle of interpretation is a guide to congressional intent, not an inflexible rule of construction. "This Court has declined to follow any rule that a statutory term is to be given its common-law meaning, when that meaning is obsolete or inconsistent with the statute's purpose." *Taylor* v. *United States*, 495 U.S. 575, 594-595 (1990); see *id.* at 595-596 (citing cases).

> *used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce * * * including wetlands adjacent thereto)* within its jurisdiction may submit to the Administrator [of EPA] a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact.

33 U.S.C. 1344(g)(1) (emphasis added). If the EPA Administrator approves a proposed state program, the Corps is divested of jurisdiction over "activities with respect to which a permit may be issued pursuant to such State program." 33 U.S.C. 1344(h)(2)(A). That provision would be meaningless if the waters subject to the Corps' Section 404 jurisdiction included no waters "other than" those that meet traditional standards of navigability.[14]

B. The Legislative History Of The 1972 Act And The 1977 Amendments Supports The Corps' Construction Of The Term "Waters Of The United States"

1. Bills introduced in 1972 in both the House of Representatives and the Senate defined "navigable waters" as "the navigable waters of the United States." See 2 Environmental Policy Div., Library of Congress, *Legislative History of the Water Pollution Control Act Amendments of*

[14] Additionally, Section 404(g)(2) and (3) (91 Stat. 1601), as added in 1977, provide that "the Secretary of the Interior, acting through the Director of the United States Fish and Wildlife Service," shall be given notice of and an opportunity to comment on a proposed state permit program. 33 U.S.C. 1344(g)(2) and (3). That requirement assumes that protection of fish and wildlife is one of the goals of the Section 404 program. The legislative history confirms that view. See S. Rep. No. 370, 95th Cong., 1st Sess. 78 (1977) ("The committee amendments relating to the Fish and Wildlife Service are designed to (1) recognize the particular expertise of that agency and the relationship between its goals for fish and wildlife protection and the goals of the Water Act.").

1972 at 1069, 1698 (1973). The House and Senate Committees, however, expressed concern that the definition might be given an unduly narrow reading. Thus, the House Report observed:

> One term that the Committee was reluctant to define was the term "navigable waters." The reluctance was based on the fear that any interpretation would be read narrowly. However, this is not the Committee's intent. The Committee fully intends that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes.

H.R. Rep. No. 911, 92d Cong., 2d Sess. 131 (1972). The Senate Report stated that "[t]hrough a narrow interpretation of the definition of interstate waters the implementation [of the] 1965 Act was severely limited. Water moves in hydrologic cycles and it is essential that discharge of pollutants be controlled at the source." S. Rep. No. 414, 92d Cong., 1st Sess. 77 (1971). The Conference Committee deleted the word "navigable" from the definition of "navigable waters," broadly defining the term to include "the waters of the United States." The Conference Report explained that the definition was intended to repudiate earlier limits on the reach of federal water pollution efforts: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes." S. Conf. Rep. No. 1236, 92d Cong., 2d Sess. 144 (1972). Those passages strongly suggest that the coverage of the Act does not

depend upon the suitability of particular waters for commercial traffic.[15]

As petitioner notes (Br. 22-23), individual supporters of the CWA occasionally described the proposed Act's coverage in terms of actual suitability for commercial transportation. Senator Muskie placed before the Senate an exhibit stating that the CWA would protect all waters that "form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried on with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today." 118 Cong. Rec. 33,699 (1972). Representative Dingell stated that "[t]he gist of the Federal test is the waterway's use as a highway, not whether it is part of a navigable interstate or international commercial highway." *Id.* at 33,757 (citations and internal quotation marks omitted). Representative Dingell also stated, however, that the term "navigable waters" as used in the CWA "means all 'the waters of the United States' in a geographical sense. It does not mean 'navigable waters of the United States' in the technical sense as we sometimes see in some laws." *Id.* at 33,756. He asserted as well that

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[15] This Court has recognized that the CWA was "not merely another law 'touching interstate waters'" but was "viewed by Congress as a 'total restructuring' and 'complete rewriting' of the existing water pollution legislation." *City of Milwaukee* v. *Illinois*, 451 U.S. at 317; see also *id.* at 318 ("Congress' intent in enacting the [CWA] was clearly to establish an all-encompassing program of water pollution regulation."); *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 22 (1981) (existing statutory scheme "was completely revised" by enactment of the CWA). Thus, even prior to the 1977 amendments, Congress's evident intent to effect a comprehensive overhaul of the existing statutory scheme casts serious doubt on petitioner's contention (Br. 15-16) that the CWA's geographic coverage should be construed by reference to prior water protection laws.

"this new definition clearly encompasses all water bodies." *Id.* at 33,757. Thus, while the remarks of individual legislators may create a degree of ambiguity on this point (by negative implication, rather than contradiction), the 1972 legislative history taken as a whole indicates that Congress did not intend to restrict the Act's coverage to waters that satisfy traditional standards of navigability.

2. During the debates on the 1977 CWA amendments, the scope of the "navigable waters" subject to the Act—and, in particular, the propriety of the Corps' assertion of jurisdiction over "isolated" waters—was a principal subject of congressional concern. The Corps' interim final regulations, published in 1975, expressed the agency's intent to assert jurisdiction (in Phase III of the phased-in approach) over waters not adjacent to traditional navigable waters. See 40 Fed. Reg. 31,321, 31,324-31,325 (1975); 33 C.F.R. 209.120(d)(2)(i) (1976).[16] A bill passed by the House of Representatives provided that for purposes of Section 404, the term "navigable waters" would be defined to mean "all waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce." 123 Cong. Rec. 10,420 (1977); see *id.* at 10,434 (passage of bill). The bill would have restricted the Corps' regulatory authority under Section 404 to "navigable waters" so defined and their "adjacent wetlands." *Id.* at 10,420.

Critics of the Corps' regulatory program pointed to the regulation of "isolated" waters as a reason to diminish the

[16] The final regulations, published in July 1977 during the pendency of the congressional debates (*i.e.*, after passage of the initial House bill but before debate in the Senate), defined the term "waters of the United States" to include, *inter alia*, "isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters of the United States, the degradation or destruction of which could affect interstate commerce." 42 Fed. Reg. 37,144 (1977); 33 C.F.R. 323.2(a)(5) (1978).

Corps' authority. Representative McKay stated that "[a]s it now stands, the corps has effective authority to require a permit application every time a dredge or fill activity is planned for any stream, ditch, or pond in the United States." 123 Cong. Rec. 10,418 (1977). Representative Abdnor similarly understood that under the existing regulations, "the Corps must regulate all waters—from the smallest to the largest, including isolated wetlands and lakes, intermittent streams, and prairie potholes." *Id.* at 34,852 (extension of remarks). He caused to be reprinted in the Congressional Record a letter from a Corps official explaining that "the ultimate test of these [regulatory] limits is a determination that an activity affects interstate commerce in connection with a given water." *Ibid.*; see also *id.* at 10,431 (remarks of Rep. Wright).

Unlike the House bill, the bill reported by the Senate Committee on Environment and Public Works did not restrict the geographic scope of the Corps' Section 404 jurisdiction. As the Senate Report explained:

> To limit the jurisdiction of the [CWA] with reference to discharges of the pollutants of dredged or fill material would cripple efforts to achieve the act's objectives.
>
> The committee amendment does not redefine navigable waters. Instead, the committee amendment intends to assure continued protection of all the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes, and other portions of the navigable waters outside the corps program in the so-called phase I waters. Under the committee amendment, the corps will continue to administer the section 404 permit program in all navigable waters for a discharge of dredge or fill material until the approval of a State program for phase 2 and 3 waters.

S. Rep. No. 370, *supra*, at 75. That passage demonstrates the Committee's understanding of the Corps' phased-in expansion of Section 404 jurisdiction in the 1975 regulations, which included tributaries of navigable waters in Phase II and "isolated" waters in Phase III. Instead of rejecting that approach, the Committee incorporated the existing regulatory scheme into an amendment authorizing partial administration of the Section 404 program by the States. The Senate bill also responded to the problem of perceived over-regulation by exempting specified activities—most notably certain agricultural and silvicultural activities—from Section 404's permit requirements. See *id.* at 75-77.

As in the House of Representatives, debate on the bill reported by the Senate Committee reflected an understanding that the Corps had asserted regulatory jurisdiction over "isolated" waters. Senator Bentsen asserted that the Committee bill "skirts the fundamental problem: the definition of Federal jurisdiction in the regulation of dredge and fill activities. The program would still cover all waters of the United States, including small streams, ponds, isolated marshes, and intermittently flowing gullies." 123 Cong. Rec. 26,711 (1977). He proposed an amendment that would have restricted the geographic scope of the Corps' authority in the same manner as the House bill—*i.e.*, to navigable waters traditionally defined and their adjacent wetlands. See *id.* at 26,710-26,711. Senator Tower supported the Bentsen amendment as a means of addressing "a regulatory scheme which covers not just the rivers of the Nation but all surface waters and wetlands of the United States." *Id.* at 26,722. On the other hand, Senator Stafford argued that it was unnecessary to narrow the definition of "waters" because the Senate bill "insures continued protection of the Nation's waters, but allows States to assume the primary responsibility for protecting those lakes, rivers, streams, swamps, marshes and similar areas that lie outside the corps program in the so-called 'Phase I waters.'" *Id.* at 26,714.

The Bentsen amendment was rejected by the full Senate. 123 Cong. Rec. 26,728 (1977). The Conference Committee adopted the Senate approach, and "efforts to narrow the definition of 'waters' were abandoned." *Riverside Bayview*, 474 U.S. at 137. Congress instead acted to protect the prerogatives of the States by enacting 33 U.S.C. 1344(g), which established a mechanism by which the States may assert ultimate administrative control over the regulation of Phase II and III waters. See S. Conf. Rep. No. 830, 95th Cong., 1st Sess. 100-101 (1977); pp. 20-21, supra.[17] As Senator Baker explained:

> [T]he conference bill retains the comprehensive jurisdiction over the Nation's waters exercised in the 1972 Federal Water Pollution Control Act to control pollution to the fullest constitutional extent. A permit program will continue to regulate dredged or fill material discharged into all our Nation's waters.

123 Cong. Rec. 39,209 (1977); see also *id.* at 39,196 (Sen. Randolph) (1977 legislation in its final form "recognizes that there must be no basic gaps in the program for protection of wetlands and waterways from contamination"); *id.* at 39,210 (Sen. Wallop) (explaining that "the conferees did not retreat from [Section 404's] broad jurisdiction" but instead sought to alleviate over-regulation by, *inter alia*, "provid[ing] for the delegation of the permit program to the States" and "preempt[ing] many activities from permit requirements").

The 1977 legislative history thus makes three points clear. *First*, Congress was well aware of the Corps' existing regulatory approach—including the Corps' inclusion of "isolated" waters within the regulatory definition of "waters of the United States"—and debate in both Houses focused on

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[17] The 1977 amendments also limited the scope of the Corps' regulatory jurisdiction by exempting specified activities from the Section 404 program. 33 U.S.C. 1344(f); see S. Conf. Rep. No. 830, *supra*, at 100-101.

the propriety of that enforcement scheme. *Second*, a proposed statutory amendment that would have limited the "waters of the United States" to traditional navigable waters and their adjacent wetlands was passed by the House of Representatives and introduced in the Senate, but Congress ultimately declined to enact it. *Third*, Congress's acquiescence in the existing regulatory definition was manifested not only by its failure to pass legislation superseding that definition, but also by its enactment of 33 U.S.C. 1344(g), which presumed that the Corps' Section 404 jurisdiction encompassed waters "other than" navigable-in-fact waters and their adjacent wetlands. Cf. *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 601 (1983) (inferring congressional acquiescence in agency interpretation from enactment of subsequent law that presumed the correctness of the agency's view); *FDA* v. *Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1313 (2000) (same). Congress's refusal to overrule the Corps' construction of the CWA as extending to "isolated" waters, together with its enactment of a new statutory provision that presumed the legitimacy of the existing regulatory definition, shows the reasonableness of the Corps' approach.

C. The Corps' Construction Of The Statutory Term "Waters Of The United States" Is Entitled To Deference

1. "Th[e] view of the agency charged with administering the statute is entitled to considerable deference," *Chemical Mfrs. Ass'n* v. *NRDC*, 470 U.S. 116, 125 (1985), and "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency," *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 844 (1984). The term "waters of the United States" is neither an established term of art (see p. 18 and note 10, *supra*) nor one with an obvious "plain meaning." The choice among reasonable alternative constructions is therefore the

province of EPA and the Corps, the executive agencies charged with the Act's administration.[18]

In *Riverside Bayview*, this Court held that in light of the well-established rule of deference to administrative judgments, judicial "review [wa]s limited to the question whether it is reasonable, in light of the language, policies, and legislative history of the Act for the Corps to exercise jurisdiction over wetlands adjacent to but not regularly flooded by rivers, streams, and other hydrographic features more conventionally identifiable as 'waters.'" 474 U.S. at 131.[19] The Court observed that "[f]aced with such a problem of defining the bounds of its regulatory authority, an agency may appropriately look to the legislative history and underlying policies of its statutory grants of authority." *Id.* at 132. While recognizing that "[n]either of these sources provides unambiguous guidance for the Corps in this case," the Court concluded that "together they do support the reasonableness of the Corps' approach of defining adjacent wetlands as 'waters' within the meaning of § 404(a)." *Ibid.*[20]

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[18] As we explain above (see pp. 2-5, supra), although the Corps and EPA initially disagreed regarding the proper construction of the term "waters of the United States," the two agencies have since promulgated substantially identical regulatory definitions. Compare 33 C.F.R. 328.3(a)(3) with 40 C.F.R. 230.3(s)(3) and 232.2. EPA's consistent view as to the broad scope of regulatory jurisdiction conferred by the CWA supports the Corps' position. See note 1, *supra* (noting the primary role of EPA in the administration of the Act). Indeed, the interpretations of the two agencies coalesce for purposes of deference in this case.

[19] Petitioner's suggestion (Br. 33 n.13) that deference is inappropriate in this case because the question presented goes to the scope of the Corps' regulatory jurisdiction is directly contrary to *Riverside Bayview*. See also *CFTC* v. *Schor*, 478 U.S. 833, 845 (1986) (holding deference appropriate notwithstanding "statutory interpretation-jurisdictional" nature of issue).

[20] The Court reached that conclusion, moreover, despite its recognition that "[o]n a purely linguistic level, it may appear unreasonable to classify 'lands,' wet or otherwise, as 'waters.'" 474 U.S. at 132. The Court explained that "the evident breadth of congressional concern for pro-

2. Petitioner contends (Br. 32) that "[t]he CWA's jurisdictional terms * * * are *not* ambiguous when read in light of settled meanings established in this Court's decisions." Reliance on the "settled meaning[]" of the term "navigable waters" is flatly inconsistent, however, with 33 U.S.C. 1344(g)(1), which assumes that federal jurisdiction exists over waters "other than" those actually or potentially suitable for commercial traffic. See pp. 20-21, *supra*. Petitioner's plain language argument is also at odds with *Riverside Bayview*, which sustained the Corps' assertion of jurisdiction over adjacent wetlands, notwithstanding the Court's recognition that such areas are neither "navigable" nor "waters" under usual understandings of those terms. See 474 U.S. at 132-133.[21]

Elsewhere, petitioner appears to acknowledge (Br. 16-17) that the Corps' jurisdiction extends to waters (including

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tection of water quality and aquatic ecosystems suggests that it is reasonable for the Corps to interpret the term 'waters' to encompass wetlands adjacent to waters as more conventionally defined." *Id.* at 133. In the instant case, by contrast, there is no dispute that the ponds on petitioner's land are "waters" within the usual understanding of that term.

[21] *Riverside Bayview* is also highly instructive with respect to several subsidiary questions implicated here. The Court in *Riverside Bayview* held that the Corps' construction of the term "waters of the United States" is entitled to deference, 474 U.S. at 131; that "the term 'navigable' as used in the Act is of limited import," *id.* at 133; that the potential applicability of the Corps' rule to some waters lacking ecological significance is unproblematic because the Corps can grant a permit in such cases, *id.* at 135 n.9; that the history of the 1977 amendments is relevant in construing the term "waters of the United States" because "a refusal by Congress to overrule an agency's construction of legislation is at least some evidence of the reasonableness of that construction, particularly where the administrative construction has been brought to Congress' attention through legislation specifically designed to supplant it," *id.* at 137; and that the language of 33 U.S.C. 1344(g)(1) bears on the proper interpretation of the term "waters of the United States" because the two provisions should be construed *in pari materia*, 474 U.S. at 138 & n.11.

wetlands) that are not themselves actually or potentially suitable for navigation, but that feed through surface connections to traditional navigable waters. On that theory, the term "waters of the United States" would encompass (a) traditional navigable waters, (b) tributaries of those waters, and (c) wetlands adjacent to waters in either of the first two categories. Petitioner contends (Br. 17) that such waters are different in kind from "isolated" waters, even those whose destruction or degradation can be expected to affect interstate commerce. But the basis for that distinction is unclear. The established meaning of the phrase "navigable waters" cannot provide the answer, since that term of art would exclude non-navigable tributaries and all wetlands. Nor does the "plain meaning" of the phrase "waters of the United States" compel the line of demarcation that petitioner advocates.

Thus, "Congress has not directly addressed the precise question at issue." *Chevron*, 467 U.S. at 843. Faced with that textual ambiguity, the Corps and EPA have devised a jurisdictional standard that turns on the prospect of interstate effects resulting from water pollution, rather than on a particular causal mechanism (surface water connections to traditional navigable waters) by which those effects may be produced. That approach is entirely reasonable, since pollution of even "isolated" waters can impair the interests that the CWA was intended and declared by Congress to protect. See pp. 19-20, *supra*.[22] The propriety of the

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[22] Petitioner's only basis for distinguishing between a non-navigable tributary and a non-navigable pond is that pollution of the tributary may ultimately degrade the quality of traditional navigable waters. See Pet. Br. 16-17. That argument assumes that Congress's only *objective* in the CWA was to protect the quality of traditional navigable waters. Under that theory, protection of non-navigable tributaries and adjacent wetlands is not an end in itself, but simply the fortuitous result of Congress's effort to protect a much narrower category of waters. The breadth of the Act's declared purposes, however—which include protection and propagation of

agencies' regulatory definition is further supported by the steps that Congress took (and declined to take) in 1977 after the Corps' approach was brought to its attention. See pp. 24-28, *supra*; *Riverside Bayview*, 474 U.S. at 137.

3. Petitioner errs in contending (Br. 33) that "[t]he Corps' claim to deference raises serious problems of delegation of lawmaking authority." This Court has long recognized that Congress in exercising its Commerce Clause authority may "le[ave] it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have" the requisite effect on commerce. *United States* v. *Darby*, 312 U.S. 100, 120 (1941).[23] Nor is there merit to petitioner's contention (Br. 33) that "Congress focused on human navigation, not the episodic migration of waterfowl." To the contrary, the "Congressional declaration of goals and policy" (33 U.S.C. 1251) that begins the CWA includes "the protection and propagation of fish, shellfish, and wildlife," 33 U.S.C. 1251(a)(2),[24] but makes no reference to the furtherance of

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fish and wildlife, see 33 U.S.C. 1251(a)(2)—strongly suggests that Congress regarded protection of such waters as independently desirable. In any event, degradation of "isolated" waters may also impair the quality of traditional navigable waters. See note 10, *supra*.

[23] For essentially the same reason, there is no merit to petitioner's reliance (Br. 26-28) on the canon that ambiguous statutes will be construed to avoid constitutional difficulties. The Corps has construed the term "waters of the United States" to encompass all waters physically located within this country (including the territorial seas) that bear a sufficient nexus to interstate commerce to support the exercise of federal regulatory jurisdiction. Since the Corps has defined the scope of its authority by reference to constitutional limits on federal power, the pertinent regulation (33 C.F.R. 328.3(a)(3)) cannot be subject to facial constitutional attack.

[24] Petitioner errs in asserting (Br. 24) that "[n]o one in 1977 so much as mentioned migratory birds as a basis for Corps jurisdiction." The 1977 legislative history includes repeated references to the need for comprehensive protection of the country's wetlands and other waters as habitat for birds and other wildlife. See S. Rep. No. 370, *supra*, at 10 (waters

navigation or to the prevention of impediments to commercial traffic. Compare Rivers and Harbors Appropriation Act of 1899, § 10, 33 U.S.C. 403 ("The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited.").

4. Finally, the Corps' exercise of regulatory jurisdiction over isolated waters does not (as petitioner contends, see Br. 28-31) threaten the federal-state balance. The Corps in evaluating permit applications recognizes that "[t]he primary responsibility for determining zoning and land use matters rests with state, local and tribal governments," and the agency "will normally accept decisions by such governments on those matters unless there are significant issues of overriding national importance." 33 C.F.R. 320.4(j)(2). Such issues of national significance include "preservation of special aquatic areas, including wetlands, with significant interstate importance." *Ibid.* Of course, the regulatory scheme contemplates that projects approved by state and local authorities may be denied a federal permit if they threaten significant national interests. But it is neither unusual nor inappropriate for a federal agency's exercise of its authority to have some preemptive effects. See, *e.g.*, *City*

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covered by Section 404 "provide nesting areas for a myriad of species of birds and wildlife"); 123 Cong. Rec. 10,415 (1977) (Rep. Lehman) (Section 404 as interpreted in the Corps' regulations "is a key to the protection of drinking supplies, finfish and shellfish spawning grounds, wildlife nesting and breeding areas, and countless esthetic and recreation benefits"); *id.* at 26,697 (Sen. Muskie) (Section 404 is necessary to protect wetlands because, *inter alia*, they "provide nesting areas for a myriad of species of birds and wildlife"); *id.* at 26,701 (Sen. Stafford) (Section 404 is "essential to the preservation of migratory and resident fish, bird and other animal populations"); *id.* at 26,716 (Sen. Chafee) ("wetlands provide the breeding and feeding areas for our migratory waterfowl"); *id.* at 26,719 (Sen. Baker) (wetlands important as, *inter alia*, "essential nesting and wintering areas for waterfowl"). Cf. note 14, *supra*.

of N.Y. v. *FCC*, 486 U.S. 57, 63-64 (1988). And a decision to deny a permit is, of course, subject to judicial review.[25]

Far from preserving the existing balance between federal and state authority, petitioner's construction of the Act would substantially alter the manner in which water pollution is currently addressed. The Corps' "other waters" regulation has been in effect for more than 20 years. Congress considered but declined to enact legislation that would have superseded that rule (see pp. 24-28, *supra*), and this Court has recognized that "the Act applies to virtually all surface water in the country." *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 (1987); see *id.* at 486 n.6 ("While the Act purports to regulate only 'navigable waters,' this term has been construed expansively to cover waters that are not navigable in the traditional sense."); *id.* at 492 ("The Act applies to all point sources and virtually all bodies of water."). The courts of appeals have uniformly agreed, moreover, that Congress intended the geographic scope of the CWA to extend to the maximum extent permissible

[25] As we explain above (see pp. 20-21, *supra*), moreover, the CWA provides a mechanism by which state authorities may assume responsibility for the protection of waters "other than those waters which are presently used, or are susceptible to use in their natural condition or by reasonable improvement as a means to transport interstate or foreign commerce * * * including wetlands adjacent thereto." 33 U.S.C. 1344(g)(1). If officials in a particular State regard the Corps' exercise of jurisdiction over isolated waters as an intrusion on state prerogatives, the Act provides a means of adjusting the division of regulatory responsibilities between federal and state authorities. See note 7, *supra*. Additional protection of state interests is provided by 33 C.F.R. 323.2(h)(2), which authorizes the Corps to issue a general permit for a category of activities when "[t]he general permit would result in avoiding unnecessary duplication of regulatory control exercised by another Federal, State, or local agency provided it has been determined that the environmental consequences of the action are individually and cumulatively minimal."

under the Commerce Clause.[26] Although the Act explicitly preserves the States' authority to regulate pollutant discharges within their borders, see 33 U.S.C. 1370, and indeed authorizes the States to assume responsibility for administering the Section 404 program with respect to Phase II and III waters, see 33 U.S.C. 1344(g), the States in fashioning their own regulatory schemes have acted against a background assumption of comprehensive federal oversight. Judicial invalidation of the "other waters" regulation at this late date can therefore scarcely be regarded as a means of preserving the federal-state balance.[27]

[26] See, *e.g.*, *United States* v. *Hartsell*, 127 F.3d 343, 348 & n.1 (4th Cir. 1997), cert. denied, 523 U.S. 1030 (1998); *United States* v. *Tull*, 769 F.2d 182, 184 (4th Cir. 1985), rev'd on other grounds, 481 U.S. 412 (1987); see also *United States* v. *Eidson*, 108 F.3d 1336, 1341 (11th Cir.), cert. denied, 522 U.S. 899 and 1004 (1997); *United States* v. *Pozsgai*, 999 F.2d 719, 731 (3d Cir. 1993), cert. denied, 510 U.S. 1110 (1994); *Leslie Salt Co.* v. *United States*, 896 F.2d 354, 357 (9th Cir. 1990), cert. denied, 498 U.S. 1126 (1991); *Quivira Mining Co.* v. *United States EPA*, 765 F.2d 126, 129-130 (10th Cir. 1985), cert. denied, 474 U.S. 1055 (1986); *Avoyelles Sportsmen's League, Inc.* v. *Marsh*, 715 F.2d 897, 914-915 (5th Cir. 1983). But cf. *Exxon Corp.* v. *Train*, 554 F.2d 1310, 1317-1331 (5th Cir. 1977) ("waters of the United States" does not cover groundwater).

[27] Indeed, petitioner's interpretation of the CWA would constrain federal regulatory authority more greatly than the rejected 1977 House bill and parallel Bentsen amendment would have done. Those legislative proposals would have narrowed the definition of navigable waters only with respect to the Corps' permitting authority over discharges of dredged and fill material under Section 404. "[T]he House bill would have left intact the existing definition of 'navigable waters' for purposes of § 301 of the Act, which generally prohibits discharges of pollutants into navigable waters." *Riverside Bayview*, 474 U.S. at 137-138. Senator Bentsen emphasized that "our amendment deals with section 404 * * * which regulates dredging and filling activities * * *. Section 404 does not speak to toxic discharges, * * * and we do not propose to change the law and permit any relaxation of our efforts to clamp down on the dumping of sewage or 'toxic spoil' or any other toxic discharges in even the smallest creek in this Nation." 123 Cong. Rec. 26,712 (1977). Petitioner's

II. USE OF PETITIONER'S WATERS BY MIGRATORY BIRDS FOR HABITAT PROVIDES A CONSTITUTIONALLY SUFFICIENT BASIS FOR FEDERAL REGULATION UNDER THE COMMERCE CLAUSE

This Court has identified "three broad categories of activity that Congress may regulate under its commerce power": (1) the use of the channels of interstate commerce; (2) the instrumentalities of interstate commerce, or persons and things in interstate commerce; and (3) intrastate activities that "substantially affect" interstate commerce. *Lopez*, 514 U.S. at 558-559 (citing, *inter alia*, *Perez* v. *United States*, 402 U.S. 146, 150 (1971)). Under *Lopez*'s third category, Congress may regulate intrastate activities that do not individually have a pronounced effect on interstate commerce if the aggregate effect of the class of activities is substantial.[28] Thus, in *Wickard* v. *Filburn*, 317 U.S. 111 (1942), this Court upheld the application of the Agricultural Adjustment Act of 1938 to the production of wheat consumed by the grower. That one such person's production of

construction of the CWA, by contrast, would threaten to deprive EPA of jurisdiction under Section 402 of the Act to regulate discharges of toxic chemicals into isolated waters, since EPA's jurisdiction is likewise confined to "waters of the United States." See 33 U.S.C. 1311(a), 1342, 1362(7), 1362(12). In addition, the 1977 House bill and Bentsen amendment would have authorized the Corps to regulate "the discharge of dredged or fill material in waters other than navigable waters and in wetlands other than adjacent wetlands" pursuant to an agreement with the Governor of the relevant State. 123 Cong. Rec. 10,421 (1977); *id.* at 26,710; see H.R. Rep. No. 139, 95th Cong., 1st Sess. 23 (1977).

[28] This Court has applied such an aggregation approach in, *e.g.*, *Hodel* v. *Indiana*, 452 U.S. 314, 324-325 (1981); *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981); *Perez* v. *United States*, 402 U.S. at 154; *Katzenbach* v. *McClung*, 379 U.S. 294, 301 (1964); *Polish Nat'l Alliance* v. *NLRB*, 322 U.S. 643, 648 (1944); *Wickard* v. *Filburn*, 317 U.S. 111, 127-129 (1942); *United States* v. *Darby*, 312 U.S. at 123.

wheat may have had trivial effects upon commerce was of no import, the Court held, "where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." 317 U.S. at 127-128.

This Court has made clear, however, that the Commerce Clause does not grant Congress plenary authority to regulate intrastate conduct based on its likely effects on the national economy. See *Lopez*, *supra*; *United States* v. *Morrison*, 120 S. Ct. 1740 (2000). In articulating the limits on the third category of permissible Commerce Clause regulation, the Court has attached substantial importance to whether the regulated activity is of a commercial character. See *Morrison*, 120 S. Ct. at 1749-1750. The Court has also emphasized that limits on Commerce Clause authority serve ultimately to ensure that Congress does not assume a general police power or usurp functions more appropriately exercised by the States. *Id.* at 1752-1754.

The Corps' exercise of regulatory authority in this case falls well within constitutional limits. Because migratory birds are a shared resource of the several States, their protection has traditionally been regarded as a task most appropriately performed by the national government. The activities for which petitioner sought a Section 404 permit are of a commercial character, and the waters involved were determined, after extensive analysis, to furnish important habitat for numerous migratory bird species. Finally, the destruction of migratory bird habitat can be expected to have a substantial aggregate effect on interstate commerce.[29]

[29] In *Sweet Home* this Court sustained, against a statutory challenge, an Interior Department regulation that construed the Endangered Species Act of 1973 (ESA) to prohibit habitat modification on private land that would kill or injure members of a listed species. See note 12, *supra*. No Member of the Court suggested that the ESA, so construed, might exceed Congress's powers under the Commerce Clause. The Fourth Circuit recently held that restrictions on takings of endangered red wolves

A. The Protection Of Migratory Bird Habitat Furthers A Governmental And Public Interest That Has Long Been Recognized To Be A Matter Of National Concern

1. In *Lopez* and *Morrison*, this Court emphasized that while congressional power under the Commerce Clause is broad, it is subject to judicially enforceable limits. The Court stressed that "[t]he Constitution requires a distinction between what is truly national and what is truly local," *Morrison*, 120 S. Ct. at 1754, and it expressed "the concern * * * that Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority," *id.* at 1752. The federal laws struck down in those cases were intended to further governmental interests—protection of the educational process, see *Lopez*, 514 U.S. at 564-566, and the "suppression of violent crime," see *Morrison*, 120 Ct. at 1754—that have as an historical matter been principally entrusted to the States. That the evils addressed by those laws might also have ultimate effects on the national economy was not, the Court

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imposed by the ESA and implementing regulations are a permissible exercise of Commerce Clause authority. See *Gibbs* v. *Babbitt*, 214 F.3d 483 (4th Cir. 2000) (Wilkinson, C.J.). The court observed that the regulated activity is properly regarded as economic in nature because "[t]he protection of commercial and economic assets is a primary reason for taking the wolves," *id.* at 492, even though the statute and rules do not require proof of an economic motive in a particular case. The court also stated that "[t]he relationship between red wolf takings and interstate commerce is quite direct—with no red wolves, there will be no red wolf related tourism, no scientific research, and no commercial trade in pelts." *Ibid.* The court of appeals rejected the plaintiffs' contention that the ESA and regulations were inconsistent with "the historic roles of federal and state authority," *id.* at 499, explaining that "[i]n contrast to gender-motivated violence or guns in school yards, the conservation of scarce natural resources is an appropriate and well-recognized area of federal regulation. The federal government has been involved in a variety of conservation efforts since the beginning of this century." *Id.* at 500.

held, a sufficient basis for federal regulation under the Commerce Clause.

By contrast, "[t]he protection of migratory birds has long been recognized as 'a national interest of very nearly the first magnitude.'" *North Dakota* v. *United States*, 460 U.S. 300, 309 (1983) (quoting *Missouri* v. *Holland*, 252 U.S. 416, 435 (1920) (Holmes, J.)). The Court in *Holland* explained that the protection of migratory birds is an interest inherently unsuited to effective vindication by the States:

> [Migratory birds] can be protected only by national action in concert with that of another power.[30] *The subject matter is only transitorily within the State and has no permanent habitat therein.* But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food

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[30] *Missouri* v. *Holland* upheld the Migratory Bird Treaty Act, a federal law enacted pursuant to the treaty power as a means of implementing an agreement between the United States and Great Britain for the protection of birds that migrated between the United States and Canada. See 252 U.S. at 431-433. The Court observed that

> [a]n earlier act of Congress that attempted by itself and not in pursuance of a treaty to regulate the killing of migratory birds within the States had been held bad in the District Court. *United States* v. *Shauver*, 214 Fed. 154. *United States* v. *McCullagh*, 221 Fed. 288. Those decisions were supported by arguments that migratory birds were owned by the States in their sovereign capacity for the benefit of their people, and that under cases like *Geer* v. *Connecticut*, 161 U.S. 519, this control was one that Congress had no power to displace.

Id. at 432. The Court concluded that "[w]hether the two cases cited [*i.e.*, *Shauver* and *McCullagh*] were decided rightly or not they cannot be accepted as a test of the treaty power." *Id.* at 433. In *Douglas* v. *Seacoast Prods., Inc.*, 431 U.S. 265, 283-285 (1977), the Court held that a State's purported "ownership" of wildlife within its borders did not provide a basis on which the State could prohibit federally licensed vessels from fishing in the State's waters. Two Terms later *Geer* was overruled. See *Hughes* v. *Oklahoma*, 441 U.S. 322, 335-336 (1979).

> supply is cut off and the protectors of our forests and our crops are destroyed. *It is not sufficient to rely upon the States.*

Holland, 252 U.S. at 435 (emphasis added). Thus, activities that threaten the well-being of migratory birds—like activities that pollute interstate waters—are a traditional and appropriate subject of federal regulation. Like water flowing in an interstate river, migratory birds constitute a natural resource of substantial economic importance that has no permanent locus in a single State. Because "the subject matter is only transitorily within the State" where the regulated activity occurs, the birds are appropriately regarded as a shared resource of the several States. The appropriate balance between species protection and other goals therefore should not be entrusted to the sole judgment of state authorities.

2. The protection of suitable habitat is an integral feature of federal efforts to protect the well-being of migratory birds. See *North Dakota*, 460 U.S. at 309-310 ("A series of treaties dating back to 1916 obligates the United States to preserve and protect migratory birds through the regulation of hunting, the establishment of refuges, and the protection of bird habitats."); compare *Sweet Home*, 515 U.S. at 699-700 (recognizing that loss of habitat for endangered species could cause their extinction). More than 50% of aquatic migratory bird habitat has been lost since the Nation's founding. Thomas Dahl, U.S. Dep't of the Interior, *Wetlands Losses in the United States 1780's to 1980's* at 1 (1990). That loss has greatly reduced the population of migratory birds. See *Waterfowl Plan* 9; *Hoffman Homes, Inc.* v. *Administrator, United States Envtl. Protection Agency*, 999 F.2d 256, 261 (7th Cir. 1993) (noting that the "cumulative loss of wetlands has reduced populations of many bird species and consequently the ability of people to hunt, trap, and observe those birds"); *Fund for Animals* v. *Frizzell*, 530 F.2d 982, 986

(D.C. Cir. 1975) ("Research and experience have demonstrated that habitat is the key factor limiting most, if not all, migratory bird populations.") (citation omitted).[31] "Isolated" waters play a crucial role as habitat for numerous aquatic species, including migratory waterfowl and other migratory birds.[32]

3. For the reasons stated above, recognition of federal power to prevent the destruction of migratory bird habitat presents no danger that "Congress might use the Commerce Clause to completely obliterate the Constitution's distinction between national and local authority." *Morrison*, 120 S. Ct. at 1752. In recognizing the "national interest" in the protection of migratory birds, the Court in *Missouri* v. *Holland* did not simply recite the obvious fact that migratory birds are

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[31] Wetlands "provide habitat essential for the breeding, spawning, nesting, migration, wintering and ultimate survival of * * * migratory birds." Emergency Wetlands Resources Act of 1986, 16 U.S.C. 3901(a)(2). See also Water Bank Act, 16 U.S.C. 1301 (declaring it to be "in the public interest to preserve, restore, and improve the wetlands of the Nation * * * to preserve and improve habitat for migratory waterfowl."). The North American Waterfowl Management Plan, signed by the United States, Mexico, and Canada, as part of the implementation of the Migratory Bird Treaty Act, recognizes the crucial importance of protecting migratory bird habitats, including ponds and wetlands. *Waterfowl Plan* 1, 9-11. Wetlands provide essential breeding and resting sites for more than 50% of the Nation's migratory bird species. Dahl & Johnson, *supra*, at 3.

[32] See National Research Council, *Wetlands: Characteristics and Boundaries* 9 (1995) ("isolated" wetlands "may even perform some unique or particularly valuable functions, including maintenance of water quality and the support of waterfowl."); *id.* at 156 ("Small, shallow wetlands that are isolated from rivers are frequently important to waterfowl."). Shallow "isolated" waters typically thaw early in the season, providing important habitat for migratory birds. *Ibid.* Prairie potholes—isolated, water-filled glacial depressions prevalent in the Plains States—provide substantial support of waterfowl and wading birds. *Ibid.* As much as half the waterfowl of North America originate from the pothole region. *Id.* at 280-281; see also *North Dakota*, 460 U.S. at 304 & n.4 (discussing importance of prairie potholes).

present throughout the country, or that the cumulative nationwide impact of migratory bird takings is substantial. Rather, the Court emphasized that the protection of migratory birds is principally entrusted to the national government because it is a task inherently unsuited to piecemeal accomplishment. The Corps' assertion of regulatory jurisdiction over "isolated" waters used as migratory bird habitat is thus fully in keeping with traditional conceptions of the "distinction between what is truly national and what is truly local." *Morrison*, 120 S. Ct. at 1754.[33]

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[33] Petitioner contends (Br. 34-36) that the Corps did not recognize until 1985 that the use of waters as habitat for migratory birds provided a basis for the exercise of federal regulatory jurisdiction. That is not the case. As early as 1975, when the Corps first announced its "phased in" approach (see p. 4 & note 2, *supra*), it stated that "[w]etlands considered to perform functions important to the public interest include * * * [w]etlands which serve important natural biological functions, including food chain production, general habitat, and nesting, spawning, rearing and resting sites for aquatic or land species." 40 Fed. Reg. 31,328 (1975). The issue in the 1985 oversight hearings on which petitioner relies (see Br. 35) was the *manner* in which the Corps had been exercising its jurisdiction—specifically, by requiring evidence of actual (and in some cases extensive) use by migratory birds. See *Oversight Hearings on Section 404 of the Clean Water Act: Hearings Before the Subcomm. on Envtl. Pollution of the Senate Comm. on Env't and Pub. Works*, 99th Cong., 1st Sess. 122-123 (1985) (*1985 Hearings*). Participants at the hearings recognized that in *Utah* v. *Marsh*, 740 F.2d 799, 804 (10th Cir. 1984), the Corps had successfully asserted jurisdiction over an intrastate lake based in part on its use by migratory birds. *1985 Hearings* 121, 208. The Acting Assistant Secretary of the Army for Civil Works assured the subcommittee that "[t]he Corps has been making jurisdictional determinations on isolated wetlands in the same way since publication of our 1977 regulations," and that a particularly controversial decision not to exercise jurisdiction over a pond in Texas was simply based on the fact that use by migratory birds in that instance was "trivial." *Id.* at 210-211; see also *id.* at 123. In any event, the Corps' assertion of regulatory jurisdiction over waters used by migratory birds as habitat is a valid exercise of Commerce Clause authority, regardless of when (or why) the Corps initially focused its attention on that category of waters.

B. The Instant Case Involves Commercial Activity Having A Substantial Impact On Actual Migratory Bird Habitat

1. The proposed activity for which petitioner sought a federal permit—the filling of ponds in order to construct a municipal landfill—is plainly of a commercial nature. This Court has repeatedly held that state and local laws governing the construction and operation of landfills constitute regulations of commercial activity and are subject to scrutiny under the Commerce Clause. See, *e.g.*, *C&A Carbone, Inc.* v. *Town of Clarkstown*, 511 U.S. 383, 389-394 (1994); *Oregon Waste Sys., Inc.* v. *Department of Envtl. Quality*, 511 U.S. 93, 98-108 (1994); *City of Philadelphia* v. *New Jersey*, 437 U.S. 617, 621-629 (1978). Just as "the rental of real estate * * * is unquestionably" a commercial use of property, *Jones* v. *United States*, 120 S. Ct. 1904, 1911 (2000), the dredge and fill activity at issue in this case amounts to commercial development.

As the case comes to this Court, it is undisputed that "the filling of the 17.6 acres would have an immediate effect on migratory birds that actually use the area as a habitat." Pet. App. 10a. The United States Fish and Wildlife Service (FWS) conducted an extensive analysis, see Fed. C.A. App. 190-198 (A.R. 16,382-16,390), and concluded that "[b]ecause of its value to migratory birds, we do not believe this site is an appropriate place to site a landfill." *Id.* at 197 (A.R. 16,389). As the Corps' decision documents make clear, the use of the ponds by migratory birds was not simply a jurisdictional trigger; rather, the potential impact of the proposed landfill on numerous bird species was a central justification for the denial of petitioner's permit application. See Fed. C.A. App. 32-40 (A.R. 15,692-15,700); pp. 8-9, *supra*. Although petitioner's district court complaint contested the merits of the Corps' permitting decision, see Pet. App. 1a-2a, that challenge was abandoned on appeal, see *id.* at 4a, and

the court of appeals accordingly "accept[ed] as true the Corps' factual findings with regard to [petitioner's] permit application, including the crucial finding that the waters of this site were a habitat for migratory birds." *Id.* at 5a.

2. Notwithstanding the commercial character of petitioner's own proposed activities, and the undisputed impact of those activities on migratory birds, petitioner's argument focuses largely on hypothetical situations not before the Court. Thus, petitioner emphasizes (see Br. 37-38) that the Corps' Section 404 regulations would encompass some discharges of dredged and fill material undertaken for non-economic motives. Petitioner also asserts that since "migratory birds will alight almost anywhere," the effect of the Corps' regulatory approach is to assert federal jurisdiction over *all* isolated waters. Pet. Br. 42; see also *id.* at 40.

This Court's analysis of the constitutional question, however, should focus on the circumstances actually before the Court. Cf. *Salinas* v. *United States*, 522 U.S. 52, 60-61 (1997) (holding that 18 U.S.C. 666(a)(1)(B) is constitutional as applied to a bribery offense that threatens the integrity of the relevant federal program, and affirming the defendant's conviction on that basis, without addressing the constitutionality of other potential applications of the statute). In part that is because "[t]his case involves an as-applied, not a facial challenge" (Pet. Br. 31 n.12) to a site-specific administrative decision. Perhaps the more fundamental point, however, is that (as we emphasize above) the Corps' determination that particular activities fall within its permitting authority does not mean that such activities are prohibited. It simply means that the Corps will scrutinize the likely impacts of a project on federal interests (including the protection of migratory birds) before deciding whether the project may go forward.[34]

[34] As the Court in *Riverside Bayview* explained:

> [I]t may well be that not every adjacent wetland is of great importance to the environment of adjoining bodies of water. But the existence of such cases does not seriously undermine the Corps' decision to define all adjacent wetlands as "waters." * * * That the definition may include some wetlands that are not significantly intertwined with the ecosystem of adjacent waterways is of little moment, for where it appears that a wetland covered by the Corps' definition is in fact lacking in importance to the aquatic environment —or where its importance is outweighed by other values—the Corps may always allow development of the wetland for other uses simply by issuing a permit.

474 U.S. at 135 n.9. Justice O'Connor's concurring opinion in *Sweet Home* reflects a similar mode of analysis. In reviewing the Interior Department's regulatory definition of the ESA term "harm" (see note 12, *supra*), Justice O'Connor acknowledged that "[o]ne can doubtless imagine questionable applications of the regulation that test the limits of the agency's authority." 515 U.S. at 714 (O'Connor, J., concurring). She agreed that the rule should be upheld, however, because she found it "clear that the regulation does not on its terms exceed the agency's mandate, and that the regulation has innumerable valid habitat-related applications." *Ibid.*

There is also every reason to believe that the instant case is representative of those in which the use of waters as habitat for migratory birds is invoked as a basis for the Corps' denial of a Section 404 permit.[35] The loss of migratory

[35] The Corps has recognized that some features containing water are not ordinarily covered by the CWA, specifically citing artificial basins used for stock watering and irrigation, swimming pools, and temporary water-filled depressions created by construction projects. 51 Fed. Reg. 41,206, 41,217 (1986). Furthermore, the great majority of activities that do involve discharges of dredged or fill material into waters of the United States are currently authorized by general permits, issued on a nationwide or regional basis pursuant to 33 U.S.C. 1344(e). The Corps has informed us that in fiscal year 1999, it received approximately 60,000 applications for Section 404 permits, of which approximately 85% were considered under some type of general permit (either Nationwide or Regional General Permits). Many of the "trivial" examples cited by petitioners (Br. 37-38) are covered by nationwide permits. For example, NWP #18 authorizes discharges up to 0.1 acre in waters of the United States; NWP #29

bird habitat has been caused overwhelmingly by commercial activities—agricultural and industrial development, urbanization, and other commercial development.[36] See *Waterfowl Plan* 9; Dahl & Johnson, *supra*, at 2.[37] A judicial focus on the

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authorizes discharges up to 0.25 acre for construction and expansion of single-family homes, subject to certain conditions to ensure that the individual and cumulative environmental effects of such discharges are minimal. See 61 Fed. Reg. 65,874 (1996), modified at 65 Fed. Reg. 12,818 (2000). NWP #39 authorizes up to 0.5 acres of fill in isolated waters. 65 Fed. Reg. 12,818 (2000). Many of the activities authorized by general permits require no predischarge notification.

Even if it were otherwise appropriate for this Court to assess the propriety of the Corps' jurisdictional rule as applied to other hypothetical discharges, it is not clear how such analysis could workably be conducted. Whether the Corps' assertion of regulatory jurisdiction in hypothetical cases would violate the Constitution surely depends in part on (a) whether the landowner is ultimately allowed to carry out the proposed activity, and (b) whether the permitting process itself is unduly burdensome. Such questions can be answered only by examining the application of the regulatory scheme as a whole to the facts of an actual case. Cf. *Williamson County Regional Planning Comm'n* v. *Hamilton Bank*, 473 U.S. 172, 186-194 (1985).

[36] As the court of appeals explained, moreover,

> any suggestion that next the Corps will be trying to regulate the filling of every puddle that forms after a rainstorm, at least if a bird is seen splashing in it, misses the point. A "habitat" is not simply a place where a bird might alight for a few minutes, as [petitioner] suggests, but rather "the place where a plant or animal species naturally lives or grows." Webster's Third New International Dictionary 1017 (1993).

Pet. App. 7a-8a. In the instant case, both the Corps and the FWS emphasized the dependence of numerous bird populations on the waters that petitioner proposed to fill. See pp. 8-9, *supra*.

[37] While Section 404 permits may occasionally be required to undertake discharges not conducted as part of a commercial project—*e.g.*, a private homeowner's decision to fill waters in his backyard without the use of a commercial contractor—such activities may be regarded as quasi-economic in essentially the same way as the homegrown wheat production and consumption that was at issue in *Wickard*. See *Lopez*, 514 U.S. at 560

facts before the Court is especially appropriate given the absence of any suggestion that this case involves an atypical application of the Corps' regulatory scheme.[38]

C. The Destruction Of Migratory Bird Habitat Has Substantial Effects On Interstate Commerce

The destruction of migratory bird habitat can be expected to have a substantial aggregate effect on interstate commerce. Migratory birds are the object of hunting activities that generate billions of dollars of commerce each year. In 1996, 3.1 million people hunted migratory birds and spent $1.3 billion doing so.[39] Fish and Wildlife Serv., U.S. Dep't of the Interior, & Bureau of the Census, U.S. Dep't of

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("Even *Wickard* * * * involved economic activity in a way that the possession of a gun in a school zone does not."). Such activities are likely to affect the value of the real estate and are essentially a mechanism by which the homeowner undertakes his own improvements in lieu of employing a commercial contractor. Compare *Wickard*, 317 U.S. at 128 (homegrown wheat "supplies a need of the man who grew it which would otherwise be reflected by purchases in the open market") (quoted in *Lopez*, 514 U.S. at 560). In any event, the absence of a bright line between commercial and non-commercial dredge and fill activities simply reinforces the appropriateness of focusing on the facts of this case, rather than on hypothetical circumstances not before the Court.

[38] As petitioner observes (Br. 45-46), this Court in *Lopez* attached no constitutional significance to evidence indicating that the defendant himself had possessed a gun with the intent to sell it. In *Lopez*, however, there was no reason to believe that the arguably commercial character of the defendant's own conduct was in any way typical of Gun Free School Zones Act violations generally. Moreover, that commercial nexus was legally irrelevant to Lopez's guilt of the offense with which he was charged. By contrast, the Corps' decision whether to grant a Section 404 permit is based on consideration of a wide range of factors, including economic concerns. See 33 C.F.R. Pt. 320.

[39] Among the migratory bird species that were found to use petitioner's waters were mallards, wood ducks, and Canada geese, which are commonly associated with recreational hunting. Fed. C.A. App. 6-10 (A.R. 2464-2468).

Commerce, *1996 National Survey of Fishing, Hunting, and Wildlife-Associated Recreation* 25 (1997) (*1996 National Survey*); Pet. App. 7a. Ducks and geese, like those that use petitioners' ponds for habitat, are two of the most popular game birds, and were hunted by 2.5 million people in 1996. *1996 National Survey* 26; see also *Waterfowl Plan* 1 ("Waterfowl are the most prominent and economically important group of migratory birds in North America. * * * Waterfowl generate a direct expenditure in excess of several billions of dollars annually."). Migratory bird hunters spend $720 million per year on hunting equipment, and 11% of bird hunters cross state lines to hunt. *1996 National Survey* 25, 60.

Like bird hunting, bird watching annually generates several billion dollars of commerce. In 1996 some 62.9 million Americans spent $29 billion on wildlife-watching activities, including bird-watching. *1996 National Survey* 91. Almost $20 billion is spent each year on equipment for wildlife-watching. *Ibid.* Out of 17.7 million bird-watchers, 14.3 million people took trips specifically to observe, feed, or photograph waterfowl; 9.5 million took trips for other water-associated birds, such as herons. *Id.* at 45, 90. More than 6 million people crossed state lines in order to engage in birdwatching. *Id.* at 90.[40]

The court of appeals correctly held that "the destruction of migratory bird habitat and the attendant decrease in the populations of these birds 'substantially affects' interstate commerce. The effect may not be observable as each isolated pond used by the birds for feeding, nesting, and

[40] The Court in *Missouri* v. *Holland* stated that it "s[aw] nothing in the Constitution that compels the Government to sit by while a food supply is cut off *and the protectors of our forests and our crops are destroyed*." 252 U.S. at 435 (emphasis added). The italicized language presumably refers to the fact that the birds eat insects that might otherwise destroy plant life. That link provides an additional way in which protection of migratory bird habitat ultimately furthers national economic interests.

breeding is filled, but the aggregate effect is clear, and that is all the Commerce Clause requires." Pet. App. 7a. Protection of national economic resources from the ill effects of local commercial activity is well within Congress's authority under the Commerce Clause, and the protection of migratory birds has long been regarded as a task primarily entrusted to national rather than state authorities. Petitioner's constitutional challenge to the Corps' assertion of regulatory jurisdiction in this case should therefore be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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